



EMPLOYMENT TRIBUNALS

Claimant:

Mr H Ghounim

v

Respondents:

On-Site (London) Limited (in
voluntary liquidation) (1)
Target Site Services Limited (2)

Heard at:

Reading

On: 16-18 August 2021

Before:

Employment Judge Anstis
Ms E Gibson
Ms F Tankard

Appearances

For the claimant:

Mr S Saeed (solicitor)

For the first respondent:

No attendance or representation

For the second respondent:

Mr S Margo (counsel)

JUDGMENT

1. The name of the first respondent is amended to “On-Site (London) Limited (in voluntary liquidation)”.
2. The claimant’s claims against the first respondent are dismissed on withdrawal.
3. The claimant’s claims that the second respondent’s failure to investigate particular matters amounted to direct religious discrimination (or harassment) is dismissal on withdrawal.
4. The claimant’s remaining claims are dismissed.

REASONS

A. INTRODUCTION

1. At the relevant times for this claim, the claimant was employed by the first respondent, but worked for the second respondent. The second respondent accepts that, for the purposes of his claims, he was a contract worker in relation to them. The first respondent is in liquidation and has not attended this hearing.
2. The claimant had worked for the second respondent, via the first respondent, on and off for around five years. His final assignment with them was as a

pipefitter in a tunnel at Terminal 3 of Heathrow Airport. On that assignment he reported to James Nicholls, an employee of the second respondent, who was his supervisor. Robert Appleby was mechanical director of the second respondent, and two levels of management above James Nicholls. In between them there was a contract manager, but the contract manager has no relevance to these claims.

3. It is common ground that on the evening of Thursday 20 June 2019 Mr Appleby notified the first respondent that they should give one week's notice to the claimant ending his assignment. They did this. The claimant raised a grievance about the ending of his assignment. The reason for the ending of the assignment and the conduct of Mr Appleby in response to the grievance are the issues we have to consider. They are set out in more detail below.
4. The claimant's claims are of victimisation and direct race and religious discrimination (or harassment). For the purposes of his claim the claimant describes himself as being a British citizen of Egyptian origin and a Muslim. He bases his victimisation claim on two protected acts, the first being an earlier complaint (in 2016 or 2017) about a colleague and the second being the grievance that followed the end of his assignment. The second respondent accepts that both are protected acts.
5. This hearing proceeded as a hybrid hearing, with the employment judge, claimant, claimant's representative and interpreter present in the tribunal room while all others attended by video (CVP). The tribunal heard evidence from the claimant, Mr Nicholls and Mr Appleby. We had a witness statement submitted on behalf of the first respondent, but as set out below all claims against the first respondent were withdrawn by the claimant during the course of the hearing, and neither of the remaining parties relied on the first respondent's evidence. Our decision and the reasons for it were given orally at the end of the hearing. These written reasons were requested by the second respondent immediately after that.
6. The parties agreed that the relevant law was as set out in the Appendix to Mr Margo's written closing submissions. Since there was no dispute between the parties as to the applicable law, we do not intend to repeat those agreed propositions of law in this judgment.
7. During the course of the hearing the claimant withdrew all his claims against the first respondent, and two of his claims against the second respondent. The claims that remained were:
 - 7.1. a claim that because of one or more of the claimant's (i) protected acts, (ii) race and/or (iii) religion, Mr Nicholls had made formal or informal reports either to managers in the second respondent or to the first respondent which resulted in the end of his assignment, and

- 7.2. because of the claimant's protected acts and/or his race, Mr Appleby had (i) not interviewed "Marian" as a witness as part of the grievance process and (ii) failed to investigate whether James Nicholls was in the tunnel on 14 June 2019 when he said he was.
8. It was the second respondent's case that the decision to end the claimant's assignment had been Mr Appleby's alone, and that Mr Nicholls had played no part in that decision, nor had he been in communication with the first respondent. If that is correct then the claimant's first claim must fail, since no allegation is made that Mr Appleby himself committed an act of race or religious discrimination (or harassment or victimisation) in concluding that the claimant's assignment should be terminated. For this element of the claim to succeed, the claimant must show that Mr Nicholls played a part in the decision to terminate his assignment, and that Mr Nicholls's actions in this respect amounted to unlawful discrimination.
9. While acknowledging the burden of proof that applies in discrimination cases, it was clearly going to be difficult for the claimant to establish this in circumstances where, as Mr Saeed admitted, the claimant had no evidence to contradict the second respondent's position that Mr Nicholls had no involvement at all in the decision to terminate his assignment.
10. The claimant's difficulties in this case were compounded by him having identified only a hypothetical comparator and providing no evidence (from which we could draw conclusions about how a hypothetical comparator would be treated in similar circumstances) of how others had been treated by the second respondent or its relevant managers.
11. Matters did not improve with the claims in respect of the investigation of the grievance, where the claimant was not able to point to anything that suggested that Mr Appleby's failure to carry out those investigative steps may have been related to the protected acts or amount to direct race discrimination (or harassment). That was particularly difficult in circumstances where Mr Appleby had been the manager responsible for resolving the claimant's earlier complaint (his first protected act) entirely to his satisfaction.
12. Unfortunately the claimant appeared to be founding his claims almost entirely on his belief that he had been discriminated against, without having paused to consider what evidence he had to support his claim.
- B. THE DECISION TO TERMINATE THE ASSIGNMENT**
13. Mr Appleby gave evidence that the decision to terminate the claimant's assignment had been made by him, and him alone. This had arisen following a labour assignment meeting on the Wednesday of the week at which it had been identified that an employed pipefitter had become available following the cancellation of an expected contract at Gatwick Airport. The claimant accepted that that employed pipefitter was more of a specialist in pipefitting than he was,

and also that he had taken over his role in the Terminal 3 tunnel. He said that the Gatwick work had not been cancelled because later in the year he saw former colleagues working there. Mr Appleby gave an account in his evidence of the contract in question, and we accept that the claimant would have no way of knowing the details of what contracts were or were not proceeding at any particular time.

14. The best that the claimant could do by way of challenging Mr Appleby's evidence on this point was to suggest that Mr Appleby had given a number of different reasons why the assignment had been terminated, and that this suggested his evidence was unreliable and could not be trusted.
15. The different reasons are said to be at pages 252 ("*our current type of project work is not really matching his skill set*") and 316 ("*he was the weakest person on site with that skill set ... our own directly employed labour became available*") of the bundle, and then in his witness statement "*a lack of project work available at the time*". While Mr Appleby could have been clearer and more direct in the original reason given, we do not see these explanations as being incompatible with each other. Broadly speaking, they are consistent with the idea that a directly employed pipefitter with better skills had become available and was preferred for the job, and there was no other work to which the claimant could be reassigned. We accept that this is what happened and that that is the reason for the end of the claimant's assignment.
16. The claimant's arguments also extended to broad criticism of Mr Nicholls's credibility. He was on firmer ground there, as two significant areas of Mr Nicholls's evidence were incorrect. He had not been in a tunnel the Friday before the work was due to start on Monday and it appears that his mobile phone did receive the claimant's message that afternoon. However, even given those difficulties it is too much for us to draw from this the inference that the claimant seeks – that Mr Nicholls is wrong about having no influence on the decision to terminate the claimant's employment, and that he sought to have the claimant's assignment terminated for reasons that amount to unlawful discrimination. For us to find that that was true would require us to conclude that Mr Appleby was lying, when there is no basis to doubt his credibility, and would also require us to conclude that the reason why Mr Nicholls was wrong in his evidence was that he was covering up his discriminatory reason for seeking the end of the claimant's assignment. We do not consider it proper to draw those inferences in this case.

C. THE INVESTIGATION

17. The claimant submitted a grievance very shortly after he received notification that his assignment was to be terminated. This went to both the first respondent and to Mr Appleby, although it is clear that as his employer the first respondent bore primary responsibility for addressing this grievance. They did so, and in doing so requested information from Mr Appleby.

18. We accept Mr Appleby's position that the claimant's primary complaint was that the termination of his assignment had been brought about by unlawful discrimination at the hands of Mr Nicholls. Mr Appleby knew that this was not the case, and quickly gave his response to the matters he had first-hand knowledge of, including the reason for the end of the assignment. He also asked Mr Nicholls and the contract manager to respond.
19. The claimant appealed the dismissal of his grievance by the first respondent, following which the first respondent wrote again to Mr Appleby asking if he would carry out further investigations, including the matters the claimant now particularly complains of. Mr Appleby did not do this. He explained to us that having addressed the central points of the grievance there was little to be gained by him then addressing these additional points. The claimant says that he did this because of the claimant's race or because he had made two protected acts.
20. As with his claim about the end of his assignment, the claimant faces fundamental problems with this. There is no evidence to suggest that Mr Appleby took the claimant's race or his previous complaints into account in deciding not to carry out any further investigation. There is nothing to suggest that Mr Appleby's response would have been any different if someone of another race had made this request, or someone who had not complained of discrimination had made this request. The claimant's position amounts at most to speculation about Mr Appleby's motives. There is nothing here that would even shift the burden of proof or require an explanation by the second respondent. However, they have provided an explanation which we accept, and we also note, as before, that Mr Appleby was the same individual who had previously intervened to the claimant's satisfaction with his earlier complaint. There is nothing to suggest that he was particularly concerned by or adversely influenced by either the claimant's race or him raising complaints of discrimination.

CONCLUSION

21. The claims that were withdrawn are dismissed on withdrawal. The remaining claims are dismissed.

Employment Judge Anstis

Date: 18 August 2021

Judgment and Reasons

Sent to the parties on: .

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For the Tribunal Office

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